RECORD
AND
BRIEF

Supreme Court, U.S.
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No. 16-307

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT MURPHY OIL USA, INC. IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, despite the National Labor Relations Act ("NLRA"), arbitration agreements requiring employees to waive their rights to pursue class or collective action employment-related claims against their employers are enforceable pursuant to the Federal Arbitration Act ("FAA").

RULE 29.6 STATEMENT

Respondent Murphy Oil USA, Inc. (hereinafter referred to as "Murphy USA") is a privately held corporation. Murphy USA, Inc. is the parent of Murphy Oil USA, Inc. and owns 100 percent of the outstanding shares.

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BRIEF FOR RESPONDENT MURPHY OIL USA, INC.

PRELIMINARY STATEMENT

This critical question involving the intersection of the FAA and NLRA has percolated through several appellate courts (with several more primed to address the same issue in the coming months). A deep circuit split has developed between the Fifth, Second, and Eighth Circuits on the one hand and the Seventh and Ninth Circuits on the other. Accordingly, this issue—which impacts thousands of employers and millions of individuals subject to arbitration agreements containing class or collective action waivers—is well positioned for this Court's review.[1]

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[1] Prior to the decision of the National Labor Relations Board (the "Board") in *D.R. Horton*, 357 NLRB No. 184 (2012), no court of appeals had squarely addressed the legality of class or collective action waivers under the NLRA. Thus, all four decisions giving rise to those petitions for writs of certiorari currently pending before the Court on the same issue (the Second, Fifth, Seventh, and Ninth Circuits) relied upon the Board's stance to formulate their respective conclusions. *See Patterson v. Raymours Furniture*, No. 15-2820, 2016 U.S. App. LEXIS 16240 (2d Cir. Sept. 2, 2016), *petition for cert. filed* (U.S. Sept. 22, 2016) (No. 16-388); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed* (U.S. Sept. 2, 2016) (No. 16-285); *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), *petition for cert. filed* (U.S. Sept. 8, 2016) (No. 16-300); *Murphy Oil USA v. NLRB*, 808 F.3d 1013 (5th Cir.

The Fifth Circuit has correctly decided this issue on multiple occasions. First, in *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (hereinafter referred to as "*D.R. Horton*"), the Fifth Circuit explicitly held that the National Labor Relations Board ("Board") erroneously ruled that an employer violated the NLRA by requiring employees to sign an arbitration agreement containing class or collective action waivers. Specifically, relying upon this Court's precedent, the Fifth Circuit explained that the Board's decision failed to accord proper deference to the policies favoring arbitration pursuant to the FAA. Despite the Fifth Circuit's clear directive, on October 28, 2014, the Board issued its decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (hereinafter referred to as "*Murphy Oil*"), which reaffirmed the erroneous legal conclusions that the Board reached in *D.R. Horton*. In turn, on October 26, 2015, the Fifth Circuit issued its decision in *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), essentially reaffirming its earlier holding in *D.R.*

2015), *petition for cert. filed* (U.S. Sept. 9, 2016) (No. 16-307). Notably, the Board was not a party in any in any of the cases giving rise to those other petitions for a writ of certiorari. As a result, while the other petitions addressing this issue contain compelling arguments, the Court should grant the Board's petition because it is the only one of the four to involve the Board's own interpretation of the NLRA. Respondent does not oppose consolidation of the Board's petition with one or more of the others pending before the Court.

Horton that the Board's ruling was incorrectly decided.

This Court's recent decisions demonstrate that the FAA has a very broad preemptive effect, and that all state and federal laws and public policies interfering with the enforcement of arbitration agreements according to their terms must give way.[2] Thus, the Board's view of the matter, that such class or collective action waivers contained within an arbitration agreement violate employees' right to engage in "concerted activities" in accordance with the NLRA, clearly creates obstacles to the enforcement of those agreements according to their terms and, therefore, conflicts with the FAA. If the Board's stance on this issue

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[2] Arbitration agreements containing class or collective action waivers are enforceable in accordance with their terms. *See Am. Express Co v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit v. GreenWood*, 665 U.S. 95, 98 (2012); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (holding that the parties to an arbitration agreement "may agree to limit the issues they choose to arbitrate" and "may specify *with whom* they choose to arbitrate."). Arbitration agreements involving federal statutory rights are enforceable unless Congress has evinced an intention when enacting a statute to override the FAA. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Congress evinced no such intent when drafting the NLRA. 29 U.S.C. § 151, *et seq.* The FAA applies to employment agreements containing class action waivers. *See Circuit City Store, Inc. v. Adams*, 532 U.S. 105, 118 (2001).

were credited, the use of arbitration will be discouraged, contrary to federal policy under the FAA.

To this end, the Board has gone to great lengths to point out that the initiation of or participation in collective legal action is a substantive right pursuant to Section 7 of the NLRA. Where, as here, individuals have brought claims pursuant to a separate and distinct statute, there are no substantive rights emanating from the NLRA. The right to participate in a class or collective action under Section 7 is a procedural device for pursuing a remedy, not the remedy itself. That is precisely why the NLRA is a waivable procedural right pursuant to this Court's well-established jurisprudence.

Despite the fact that the Fifth Circuit, not the Board, has correctly decided this issue, the Court should grant the Board's petition for a writ of certiorari because the Seventh and Ninth Circuits, in contrast to the Fifth, Second, and Eighth Circuits, have held that such class or collective action waivers contained in arbitration agreements violate the NLRA and are therefore unenforceable. *Compare Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), *petition for cert. filed* (U.S. Sept. 8, 2016) (No. 16-300) *and Lewis v. Epic Sys.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed* (U.S. Sept. 22, 2016) (No. 16-388) *with Patterson v. Raymours Furniture,* No. 15-2820, 2016

U.S. App. LEXIS 16240 (2d Cir. Sept. 2, 2016), *petition for cert. filed* (U.S. Sept. 22, 2016) (No. 16-388); *Cellular Sales v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *and Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (U.S. Sept. 9, 2016) (No. 16-307).

The Board has nevertheless flouted the Fifth Circuit's directives by repeatedly issuing contrary rulings. Critically, however, the circuit split has finally empowered the Board to abandon its policy of failing to acquiesce to decisions of higher authorities (such as the Fifth and Eighth Circuits)[3] and file the instant petition for a writ of certiorari (which it failed to do in response to the Fifth Circuit's earlier decision in *D.R. Horton*). Granting the Board's petition is essential to ensure courts and the Board take a *uniform approach* to this issue rather than the current approach, which has resulted in a patchwork of inconsistent rulings and the denial of much-needed predictability.

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[3] *See Cellular Sales*, 824 F.3d at 772. Additionally, the issue is pending before at least five other courts of appeals. *See The Rose Group v. NLRB*, Nos. 15-4092 and 16-12 (3d Cir.); *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 and 16-1159 (4th Cir.); *NLRB v. Alternative Entm't, Inc.*, No. 16-1385 (6th Cir.); *Everglades Coll., Inc. v. NLRB*, Nos. 16-10341 and 16-10625 (11th Cir.); *Price-Simms, Inc. v. NLRB*, Nos. 15-1457 and 16-1010 (D.C. Cir.).

The Board's petition presents the Court with an appropriate vehicle to settle the question of whether these agreements are enforceable and thus to resolve the existing uncertainty.

STATEMENT OF FACTS

Murphy USA is a Delaware corporation that operates retail gas stations in twenty-five states throughout the country. One of its retail gas stations is located in Calera, Alabama. Until March 6, 2012, Murphy USA required employment applicants at its various retail facilities to sign an arbitration agreement (the "Agreement"). The Agreement requires employees to waive the right to pursue class and collective actions before an arbitrator and mandates that certain employment-related disputes be arbitrated rather than litigated in a court of law. The Agreement provides, in pertinent part:

> Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to [sic] Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims

> and all related claims against managers, by binding arbitration . . . .

(Pet. App. 25a).

On or about March 6, 2012, Murphy USA implemented a revised Agreement for all applicants and employees hired thereafter (the "Revised Agreement"). The Revised Agreement provides:

> Notwithstanding the group, class or collective action waiver set forth in the preceding paragraph, Individual and Company agree that Individual is not waiving his or her right under Section 7 of the National Labor Relations Act ("NLRA") to file a group, class or collective action in court and that Individual will not be disciplined or threatened with discipline for doing so. The Company, however, may lawfully seek enforcement of the group, class or collective action waiver in this Agreement under the Federal Arbitration Act and seek dismissal of any such class or collective claims. Both parties further agree that nothing in this Agreement precludes Individual or the Company from participating in proceedings to adjudicate unfair labor practices charges before the National Labor Relations Board ("NLRB"), including, but not limited to, charges addressing the enforcement of the group, class

> or collective action waiver set forth in the preceding paragraph.

(Pet. App. 28a).

Murphy USA has implemented, maintained, and enforced the Revised Agreement only for employees hired after March 6, 2012. Employees and other applicants hired before March 6, 2012, are subject to the Agreement. Murphy USA requires applicants for employment at its various retail facilities, including the retail facility in Calera, Alabama, to complete and submit an application form. Applicants must execute and submit the Agreement before being considered for employment.

Murphy USA employed Sheila Hobson from about November 15, 2008, until September 17, 2010 at its facility in Calera, Alabama. On or about November 5, 2008, at the time of her application and before Murphy USA employed Hobson, she signed the Agreement.

On June 11, 2010, Hobson and employees Christine Pinckney, Susan Ellington, and Santressa Lovelace filed a collective action against Murphy USA in United States District Court, Northern District of Alabama, No. CV-10-HGD-1486, seeking compensation for alleged violations of the Fair Labor Standards Act ("FLSA").

On July 26, 2010, Murphy USA moved for an order enforcing the Agreement, compelling the employees to individually arbitrate their claims, and dismissing the collective action in its entirety, on the basis that the employees had signed the Agreement to arbitrate all claims individually and had thereby waived the right to bring any collective claims or suits pertaining to their wages, hours, and terms and conditions of employment.

On April 26, 2012, the Magistrate Judge issued his Report and Recommendation granting Murphy USA's motion. Notably, the Magistrate Judge adopted all of Murphy USA's legal theories and rejected *D.R. Horton,* finding "*D.R. Horton* . . . directly conflicts with the reasoning of the Supreme Court in *AT&T Mobility.*" *Hobson v. Murphy Oil*, No. CV-10-HGD-1486, slip op. at 20 (N.D. Ala. Apr. 26, 2012). On September 18, 2012, the District Court issued an Order adopting and approving the Magistrate Judge's recommendation to compel arbitration of the dispute and further staying the civil action pending arbitration. *Hobson v. Murphy Oil*, No. CV-10-HGD-1486, slip op. at 4 (N.D. Ala. Sept. 18, 2012). The employees, including Hobson, never appealed the District Court's decision compelling arbitration nor took any steps to further pursue their claims in an arbitral forum. Rather, in February 2015, the employees moved for reconsideration of the District Court's decision after the Board issued its decision in *Murphy Oil.* The District Court denied

their motion and ultimately dismissed their case for their "willful disregard" of instructions to proceed to arbitration to "gain[] strategic advantage." *Hobson v. Murphy Oil*, No. CV-10-HGD-1486, 2015 U.S. Dist. LEXIS 88241, at *8 (N.D. Ala. July 8, 2015).

In January 2011, Hobson filed an unfair labor practice charge with Region 10 of the Board. The Board's General Counsel subsequently issued a complaint alleging that Murphy USA violated Section 8(a)(1) of the NLRA by maintaining and enforcing the Agreement.[4]

On October 28, 2014, the Board issued its decision in *Murphy Oil*, 361 NLRB No. 72 (2014), holding that both the Agreement and the Revised Agreement (collectively the "Agreements") violated Section 8(a)(1) of the NLRA and that Murphy USA unlawfully attempted to enforce the Agreements via its motion. A bare majority with two dissents reaffirmed the Board's decision in *D.R. Horton*, 357 NLRB No. 184 (2012), despite the Fifth Circuit's holding which specifically denied enforcement of the Board's order.

Murphy USA filed a petition for review in the Fifth Circuit. On October 26, 2015, the Fifth

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[4] In October 2012, the General Counsel amended its complaint against Murphy Oil.

Circuit issued its decision, again denying enforcement in relevant part of the Board's order. The court's central holding was brief: "Our decision [in *D.R. Horton*] was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here." (Pet. App. 8a).

After the Fifth Circuit denied the Board's petition for *en banc* review, (Pet. App. 213a-214a), the Board filed its Petition for a Writ of Certiorari.

ARGUMENT

I. This Appeal Provides the Court with an Appropriate Vehicle To Resolve the Question Presented, an Issue that Has Divided the Circuits.

Murphy USA and the Board have opposing views of the merits of this appeal. Nevertheless, the parties agree that the Board's petition provides an appropriate vehicle for the Court to resolve the issue that has caused the courts of appeals to issue conflicting opinions.

A. The Board Has Finally Abandoned Its Nonacquiescence to the Fifth Circuit's Decisions and Recognized that Supreme Court Intervention Is Necessary.

As noted above, despite the Fifth Circuit's decisions in *D.R. Horton*, 737 F.3d at 344, and *Murphy Oil*, 808 F.3d at 1013, the Board has continued to issue contrary decisions against employers which do business within the Fifth Circuit, causing employers to incur the expense of obtaining a result that is pre-ordained in light of *D.R. Horton* and *Murphy Oil*. *See Citi Trends v. NLRB*, No. 15-60913, 2016 U.S. App. LEXIS 14683 (5th Cir. Aug. 10, 2016); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 U.S. App. LEXIS 12889 (5th Cir. June 16, 2016); *Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613, 614-615 (5th Cir. 2016). Indeed, the Board issued its decision in *Citi Trends after* the Fifth Circuit's decision in *Murphy Oil*.

The purpose of nonacquiescence is to achieve "a uniform and orderly administration of a national act, such as the [NLRA]." *Heartland Plymouth Court MI v. NLRB*, No. 15-1034, 2016 U.S. App. LEXIS 17688, at *9 (D.C. Cir. Sept. 30, 2016) (citation omitted). As such, in deciding "'whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due def-

erence to the court's opinion, to adhere to its previous holding *until the Supreme Court ... has ruled otherwise,*' the Board claims to ensure a nationally uniform labor policy." *Id.* at *9-10 (citation omitted). Thus, "not acquiescing to a given circuit's diverging legal interpretation until the Supreme Court has the last word puts two roles in harmony—the Board's role of national say in what labor law should be, and the 'judicial department['s]' 'emphatic[]' 'province and duty . . . to say what the law is.'" *Id.* at *10 (quoting *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803)); *see also Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992) ("[w]hen an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court.").

The Board's nonacquiescence policy permits an "issue's 'percolation' among the circuits; generating a circuit split that can improve the likelihood of *certiorari* being granted." *Heartland Plymouth*, 2016 U.S. App. LEXIS 17688, at *11 (quoting *Johnson*, 969 F.2d at 1093, 1097 (Buckley, J., concurring and dissenting in part)) ("Catching Congress' ear . . . is more easily said than done; and given the huge volume of petitions for *certiorari* that flood the Supreme Court, it is often [more] necessary to establish a split among the circuits before the Court will examine [the] issue.'").

Importantly, one of the most influential academic writings on nonacquiescence explains why Supreme Court review is necessary under these circumstances:

> Of course, agencies generally cannot directly petition the Supreme Court but must obtain the clearance of the Solicitor General . . . .We do not mean to authorize judicial review of the delicate negotiations and deliberative processes that inform the Solicitor General's decision whether or not to petition for *certiorari. Nevertheless, the government cannot defend continued nonacquiescence without seeking Supreme Court intervention merely because it has chosen to divide petitioning authority in this way.*

Heartland Plymouth, 2016 U.S. App. LEXIS 17688, at *12 n.4 (quoting Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 756-57 (1989) (emphasis added)).[5]

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[5] As discussed below, Section 10(f) of the NLRA contains a multi-venue provision which further complicates the nonacquiescence issue. Although there are some cases where the Board may not know where a party aggrieved by an adverse Board order will file a petition for review, it is abundantly clear that any employer transacting business within the Fifth Circuit will seek review in that court with

Nonacquiescence, however, has its limitations. As recently noted in *Heartland Plymouth*, "nonacquiescence allows agencies to work their will on not only the courts, but on the American People too." 2016 U.S. App. LEXIS 17688, at *20 (quoting *Johnson*, 969 F.2d at 1092) ("The Board, in the end, can hardly defend its policy of selective nonacquiescence by invoking national uniformity. The policy has precisely the opposite effect, since it results in very different treatment for those who seek and who do not seek judicial review."); *see also* Donald L. Dotson & Charles M. Williamson, *NLRB v. The Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739, 745 (1987) ("Even worse, [nonacquiescence] compels litigants to expend resources in litigating cases in which it is clear that the appropriate circuit will not enforce the Board's order.").

This matter is ripe for Supreme Court review. While the Board as a party has not been able to directly convince another Circuit Court that class or collective action waivers contained in ar-

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respect to whether a class or collective action waiver contained in an arbitration agreement violates the NLRA. *See, e.g., Ithaca Coll. v. NLRB*, 623 F.2d 224, 227 (2d Cir. 1980) ("Certainly the College was not going to seek review in the D.C. Circuit when it had a favorable precedent in the Second Circuit."). Because of the Fifth Circuit's decision in *D.R. Horton*, it would make no sense for Murphy USA to have sought review in any other court.

bitration agreements violate the NLRA, the Seventh and Ninth Circuits have reached the opposite conclusion from the Fifth Circuit in cases involving private litigants. As a result of this circuit split, the Board has recognized that its nonacquiescence policy with respect to this issue is no longer appropriate and has convinced the Solicitor General to file a petition for a writ of certiorari in this case. The Court should grant the writ because otherwise the Board will have no reason to forego its non-acquiescence policy, thus subjecting litigants to uncertainty. In addition, as discussed below, employers transacting business in the Second, Fifth, or Eighth Circuits will seek appellate review where the result is a fait accompli.[6]

As a result, failing to grant the Board's petition for a writ of certiorari at this juncture will only serve to *undermine* uniformity in national labor policy because of the already inconsistent views on this issue among the courts of appeals

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[6] Further, the NLRA's multi-venue statute governing petitions for review favors larger employers with expansive geographic operations. *See* 29 U.S.C. § 160(f). In that sense, it is more likely that a national corporation will be able to find a favorable venue than an employer only transacting business in a single state (which may be within the confines of the Seventh or Ninth Circuits). There is no valid basis for disparately treating employers of different sizes or places of operation with respect to such an important issue.

(with still more circuits primed to address the issue in the near future).[7]

B. Failure to Grant the Board's Petition for a Writ of Certiorari Will Lead to Untenable Results.

As noted, the employees filed a collective action in the District Court on June 11, 2010, and Murphy USA responded by filing a motion to compel arbitration, which the District Court granted. In January 2011, Ms. Hobson filed an unfair labor practice charge with the Board. Unlike the District Court, the Board found the class or collective action waiver contained in the Agreements violated the NLRA and was thus unenforceable. At that juncture, pursuant to 29 U.S.C. § 160(f), Murphy USA had the following options as to where to seek appellate review: (1) in the Eleventh Circuit where the unfair labor practice allegedly took place; (2) in any circuit in which it transacted business (including the Fifth Circuit); or (3) in the D.C. Circuit. The following example is illustrative as to why this Court should grant the Board's petition for a writ of certiorari.

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[7] The other alternative for employers and employees transacting business exclusively *outside* the Fifth or Eighth Circuits who seek to rely on arbitration agreements containing class or collective action waivers is to consider commencing transacting business in the Fifth or Eighth Circuits. Such a maneuver would create too much of an incentive for forum shopping.

1. Res Judicata Concerns Will Develop Absent a Final Ruling on this Issue.

Given the Fifth Circuit's decision in *D.R. Horton*, it is not surprising that Murphy USA opted to file a petition for review of the Board's decision in that court. Further, because the Fifth Circuit was bound by the precedent established in *D.R. Horton*, it was foreseeable that Murphy USA would prevail with respect to its petition for review. As a result, in this case, the Fifth Circuit and a district court (Northern District of Alabama) bound by another Court of Appeals (the Eleventh Circuit) held the class or collective action waiver at the heart of this matter was lawful and enforceable.

Nevertheless, in light of the current appellate landscape regarding this issue, consistent results will not always occur. For example, if the employees in the underlying litigation appealed the District Court's order compelling arbitration to the Eleventh Circuit[8] and that court joined the Seventh or Ninth Circuits in finding that the class or collective action waiver violated the NLRA, it is unclear which court's ruling would prevail: the Eleventh Circuit or the Fifth Circuit. This Court

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[8] The employees did in fact appeal to the Eleventh Circuit on other grounds but the parties resolved the matter before the Eleventh Circuit had an opportunity to issue a decision.

should take the opportunity to resolve the issue at this juncture.

This Court was presented with a similar issue in *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 295 (1917), and held that the Seventh Circuit erred in failing to give res judicata effect to an earlier decision issued by the Sixth Circuit involving the same patent infringement issue and parties in privity with one another. Specifically, this Court held:

> With the identity of the subject-matter and issues of the two cases admitted, the privity of parties to them clear, and the question of the ruling effect of the decree of the Circuit Court of Appeals for the Sixth Circuit presented in an appropriate manner to the Circuit Court of Appeals for the Seventh Circuit, a court of coordinate jurisdiction, we cannot doubt that the latter court fell into error in not sustaining the motion of the petitioners to affirm the decision of the Circuit Court. The defendants should not have been put to further expense, delay and trouble after the motion was presented.

Id. at 298-99.

Based on *Hart Steel*, the Fifth Circuit's decision should bar any adverse determination by the Eleventh Circuit on res judicata grounds.

Nevertheless, presume the Eleventh Circuit issued its decision before the Fifth Circuit had the opportunity to weigh in on Murphy USA's petition for review. Pursuant to *Hart Steel*, the Fifth Circuit could be bound by the Eleventh Circuit's earlier determination on res judicata grounds despite its earlier precedent reaching the opposite conclusion. The key to this exercise is that the Supreme Court was called upon to resolve an issue between two courts of coordinate jurisdiction, which could be the case here. *See N.Y. Scaffolding Co. v. Liebel-Binney Constr. Co.*, 254 U.S. 24, 26 (1920) (explaining that Third Circuit's "embarrassment of 'disturbing the force of a decision of a court of coordinate jurisdiction,' formed 'upon precisely the same issues and upon substantially the same facts'" led the Court to grant certiorari.).

Accordingly, inasmuch as there is a very realistic chance that two appellate courts of coordinate jurisdiction could reach conflicting outcomes, raising res judicata concerns, this matter is ripe for this Court's intervention.

2. The Effect of Courts Declining To Give Deference to Board Orders

In *Murphy Oil*, the Board's order directed Murphy Oil to "[n]otify the United States District Court for the Northern District of Alabama that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to

dismiss Sheila Hobson's and her coplaintiffs' FLSA collective action and to compel arbitration of their claims, and inform the court that it no longer opposes the plaintiffs' FLSA action on the basis of those agreements." (Pet. App. 87a). Of course, in this case, the Fifth Circuit denied enforcement of the Board's order. Even assuming that this Court were to grant the Board's petition for a writ of certiorari and reverse the Fifth Circuit (which Murphy USA submits this Court should not do with respect to the reversal), the District Court already granted the motion to dismiss and the time for the employees to appeal that decision has long expired.

There are nevertheless very troubling jurisdictional and stare decisis problems lurking should, in the future, another appellate court grant the Board's application for enforcement of this remedy and a district court outside that appellate court's jurisdiction refuses to acquiesce. Again, a nationwide rule imposed by this Court will ameliorate these issues.

The factual scenario discussed above is very real given that the issue at the heart of this matter has already presented itself in the last year to appellate courts on review from both district courts and the Board. Moreover, it is a fact that many employers transact business in more than one appellate jurisdiction (as Murphy USA does), and those same employers cannot predict where

employees will attempt to file class or collective action litigations challenging the enforceability of the class or collective action waiver contained in an arbitration agreement. In fact, at present, a nationwide employer utilizing a class or collective action waiver contained in an arbitration agreement would arguably not be able to rely upon that provision to defend against a nationwide class or collective action filed in a district court within the confines of the Seventh or Ninth Circuits. This would be true even if putative class members resided within jurisdictions where class or collective action waivers contained in arbitration agreements have been deemed enforceable (i.e., the Fifth or Eighth Circuits).

The resulting uncertainty can only be prevented if the Supreme Court grants the petition for a writ of certiorari.

C. Selective Enforcement Erodes Uniform National Labor Policy.

In the present case, the Board is involved only because Ms. Hobson filed an unfair labor practice charge. The Board is the agency responsible for administering the NLRA and can only act if a private party files an unfair labor practice charge. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) ("neither the Board nor its agents are authorized to institute charges *sua sponte*."), *overruled in part on other grounds by*

Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc). As noted by one of the dissenting members in *Murphy Oil*, "[t]he Board cannot exercise jurisdiction over any dispute unless a charge is filed, and many litigants (for numerous reasons) will predictably fail to file NLRB charges regarding the litigation of non-NLRA claims." (Pet. App. 112a) (Member Miscimarra). Further, this dissenting opinion explained that "[t]he Board has no right to 'party' status in non-NLRA cases, and non-NLRA statutes obviously vest jurisdiction in the appropriate court or agency, *not* the NLRB."[9] (Pet. App. 112a) (Member Miscimarra).

Additionally, the FAA and NLRA are not congruous. While both statutes cover a vast majority of employers and workers, the NLRA does not cover every employer or worker governed by the FAA. For example, airline pilots and most airline employees are subject to the FAA and Rail-

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[9] For this reason, the Board likewise could not use its powers to seek injunctive relief pursuant to 29 U.S.C. § 160(j) to enjoin employers from asserting the existence of an arbitration agreement containing a class or collective action waiver as a defense to a class or collective action filed by employees. Even if such injunctive relief could be sought, and a district court granted such relief, the same issues described above could result if the district court issuing the injunction was not the same as the court in which the class or collective action was filed.

way Labor Act. *See JetBlue Airways Corp. v. Stephenson*, 88 A.D.3d 567, 570, 931 N.Y.S.2d 284, 287 (1st Dep't 2011); *see also Air Line Pilots Ass'n v. NLRB*, 525 F.3d 862, 868 (9th Cir. 2008). Similarly, there are certain classifications of individuals (such as independent contractors or those defined under Section 2(11) of the NLRA as supervisors) who are generally not covered by the NLRA even though they could be class or collective action members under the FLSA.

As a result, absent this Court's resolution of the issue, there will be a "patchwork where (i) some plaintiffs and defendants would have non-NLRA procedural issues dictated by the NLRB, and (ii) these same procedural issues for other plaintiffs and defendants—*even in the same case*—would be adjudicated by the non-NLRA court or agency." (Pet. App. 113a) (Member Miscimarra dissenting). Therefore, the Board's petition for a writ of certiorari should be granted.

II. Even Though the Petition Should Be Granted, the Fifth Circuit Correctly Decided that Class or Collective Action Waivers Do Not Violate the NLRA.

On December 3, 2013, the Fifth Circuit granted the petition for review filed by D.R. Horton, Inc. and ultimately set aside the Board's decision invalidating the company's arbitration agreement, holding that "the Board's decision did

not give proper weight to the [FAA]." *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344, 348 (5th Cir. 2013). In a detailed opinion, the Fifth Circuit examined the Board's *D.R. Horton* decision in light of this Court's precedent and rejected all of the Board's arguments. It is this decision that the Fifth Circuit re-adopted in *Murphy Oil.* The highlights as to why the Fifth Circuit's decisions are correct are detailed below.

A. The FAA's Savings Clause Does Not Apply.[10]

First, the Fifth Circuit in *D.R. Horton* held that the right to participate in a class or collective action is not a substantive right, but rather, is a "procedural device." 737 F.3d at 357 (citation and internal quotation marks omitted). The Fifth Circuit also held that the Board could not rely on the FAA's "saving clause" to justify its invalidation of arbitration agreements. *Id.* at 359-60.[11] On this

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[10] For additional discussion with respect to this issue, *see* Brief for the Chamber of Commerce of the United States as Amicus Curiae, *NLRB v. Murphy Oil USA, Inc.* (No. 16-307), at 17-23.

[11] The FAA's saving clause provides, in pertinent part: "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and en-

point, the Fifth Circuit explained that "[r]equiring the availability of class actions interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'" *Id.* (citations and internal quotation marks omitted).

The Fifth Circuit also determined that the Board's prohibition of class action waivers disfavors arbitration, explaining that "[w]hile the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration." *Id.* at 360. Therefore, the Fifth Circuit held that "[a] detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Id.* at 359.

From a practical perspective, the Board's stance on this issue is flawed because it undermines the well-established federal policy favoring arbitration. Unquestionably, an agreement to arbitrate requires mutual assent by both parties. In the present case, the Agreements memorialize a beneficial quid pro quo for both Murphy USA and its employees: employees agree to arbitrate any

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forceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" *Id.* at 359 (quoting 9 U.S.C. § 2). The Fifth Circuit noted that the Board incorrectly found D.R. Horton's arbitration agreement "violated the collective action provisions of the NLRA, making the saving clause applicable." *Id.* at 359.

employment-related claims on an individual basis in exchange for the benefit of new employment. The Board ignores that there may be many reasons why an employee would prefer to agree to arbitrate employment-related claims on an individual basis (e.g., enhanced compensation in exchange for the pledge or individualized control over the arbitration without concern for dissimilar comparators who may undermine a claim).

Although the Board has repeatedly reiterated that the FAA and NLRA are "capable of coexistence," it has never offered a framework under which the FAA would adequately be accommodated under its view. The Board's view, taken to its core, would serve to *always* nullify arbitration agreements that in the Board's view infringe upon the NLRA. This stance is troubling given that the Board has no authority to make findings with respect to statutes *other* than the NLRA. As a matter of course, at this juncture, the clash between the NLRA and FAA can only be resolved in a federal appellate court or this Court because these are the only bodies that have jurisdiction to exercise review of both statutes. *Murphy Oil*, 808 F.3d at 1013. Given the split in authority among the circuits, the issue must be decided by this Court, and this case provides an appropriate vehicle for the Court to do just that.

B. The NLRA Contains No Congressional Command To Override the FAA.[12]

The Fifth Circuit correctly concluded that the NLRA does not contain a congressional command to override the FAA. Relying on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), the Fifth Circuit stated: "When considering whether a contrary congressional command is present, courts must remember 'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *D.R. Horton,* 737 F.3d at 360 (citations and internal quotation marks omitted). The Fifth Circuit explicitly held that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* Moreover, the Fifth Circuit found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. *Id.* at 361-62.

The Fifth Circuit also noted that it was of some importance that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." *Id.* at 362. Thus, the

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[12] For additional discussion with respect to this issue, *see* Brief for the Chamber of Commerce of the United States as Amicus Curiae, *NLRB v. Murphy Oil USA, Inc.* (No. 16-307), at 7-10.

Fifth Circuit reached the conclusion that "[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA...." *Id.*[13]

Although it is clear from this Court's precedent that a congressional command may serve to invalidate a conflicting arbitration agreement, this is not a case which fits within such a proscription. The Board does not and cannot point to anything in either the FAA's or NLRA's text or legislative history that could support a finding that a congressional command renders the FAA subservient to the NLRA. Only Congress is empowered to modify the competing federal statutes in this case, and until either Congress does so, or the Supreme Court rules otherwise, the Board's findings are untenable.

Moreover, the Board has consistently ignored that for the NLRA to have any relevance in this regard, employees must first avail themselves of substantive rights afforded *under other statutes*. (Pet. App. 90a-91a). The following scenario is illustrative. A single employee may file an age discrimination claim under the Age Discrimination in Employment Act ("ADEA") without asserting any rights under the NLRA. Conversely,

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[13] *Cf. Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335-36 (11th Cir. 2014); *Sutherland v. Ernst & Young*, 726 F.3d 290, 296-97 (2d Cir. 2013); *Owen v. Bristol Care*, 702 F.3d 1050, 1052-53 (8th Cir. 2013).

for a group of employees to assert NLRA rights in this scenario, they would also *necessarily* have to avail themselves of their rights under the ADEA. In other words, the NLRA cannot have any relevance without the ADEA or some other employment-related statute, just as a procedural rule has no viability unless a substantive claim is asserted. *D.R. Horton*, 737 F.3d at 357. Whether or not the Board concludes that the right to participate in a class or collective action constitutes protected concerted activity under Section 7, this does not change the reality that a class action is a procedural device for pursuing a remedy, not the remedy itself. Indeed, using the analogue of Rule 23, the Court has held "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also D.R. Horton*, 737 F.3d at 357. As a result, the NLRA is not "coequal" under these circumstances. Rather, it is a sidekick.

In sum, despite the fact that Respondent agrees with Petitioner that the Board's petition for a writ of certiorari should be granted, the Fifth Circuit's holding on this issue was correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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